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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-126

BOYER BROTHERS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

REPLY BRIEF FOR THE PETITIONER COMPANY

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

This reply brief is filed under Rule 24, Paragraph 4 of the Court addressed to the argument of the National Labor Relations Board raised in the Board's memorandum in opposition to the company's Petition which argument has not heretofore been advanced by the Board.

1. As stated in the company's Petition, the issue before this Court has narrowed to a finding made by the National Labor Relations Board concerning a company supervisor, Betty Henry. The Board made a finding that "Betty Henry solicited signatures on authorization cards" (Pet. App. 84a, n. 2).

2. No exceptions were taken to this Board finding nor was any attempt made to show that extraordinary circumstances prevented the parties from objecting to such Board finding. Section 10(e) of the National Labor Relations Act provides in pertinent part as follows:

> " ... no objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances ..." 49 Stat. 454, as amended, 29 U.S.C. Sec. 160(e).

3. Notwithstanding the provisions of Section 10(e) of the Act the Court below overruled subject Board finding by stating:

> "We conclude that the Board's finding that Betty Henry had solicited signatures is not supported by substantial evidence" (Pet. App. 18a).

4. The Board in its memorandum attempts to justify the lower Court's ruling by combining two issues which are entirely separate. One issue relates to a post-hearing company motion that contained supporting affidavits from employees Rinker and Reeseman in which the company sought to adduce evidence concerning solicitation by supervisor Betty Henry of union authorization cards from employees. The Court below held on that issue it was not an abuse of discretion for the Board to refuse to re-open

the record to take additional evidence (Pet. App. 16a). However, another issue is whether the Court below is permitted to overrule the specific Board finding that supervisor Betty Henry had, in fact, solicited union authorization cards. The lower Court's ruling on the issue of whether the Board should have allowed the taking of additional evidence—the issue discussed by the Board in its memorandum to this Court—must of necessity be treated separate and apart from whether the lower Court is permitted to test the sufficiency of evidence in support of the finding, made by the Board in its supplemental decision, that Betty Henry solicited union authorization cards. What the lower Court has attempted to do is to test the sufficiency of the Board's subject unexcepted-to finding. It is precisely such practice that this Court has refused to permit and it is strongly submitted that the lower Court should not have disturbed the Board finding in the absence of exceptions being filed to such finding. *N.L.R.B. v. Ochoa Fertilizer Corporation*, 368 U.S. 318, 322; *N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385, 388-389; *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253; *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 386; *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 350; *N.L.R.B. v. District 50, United Mine Workers of America*, 355 U.S. 453, 463-464.

CONCLUSION

In the absence of exceptions, the lower Court was clearly in error in attempting to test the sufficiency of the particular Board finding herein involved and it is submitted that the case should be remanded to the lower Court for further consideration.

Respectfully submitted,

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ASA AMBRISTER,

Counsel for Petitioner.